UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

FARRAH MARQUETTE,	)	
	)	
Plaintiff,	)	Case No. CV 18-1719
	)	Green Bay, Wisconsin
vs.	)	
	)	August 14, 2019
OSHKOSH DEFENSE, LLC,	)	10:00 a.m.
	)	
Defendant.	)	

TRANSCRIPT OF ORAL ARGUMENT RE:
MOTION FOR CONDITIONAL CLASS CERTIFICATION
BEFORE THE HONORABLE WILLIAM C. GRIESBACH
UNITED STATES CHIEF DISTRICT JUDGE

APPEARANCES:

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TRANSCRIPT OF PROCEEDINGS

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THE COURT: Be seated.

THE CLERK: The Court calls Case No. 18-CV-1719, *Farrah Marquette vs. Oshkosh Defense LLC*, for an oral argument.

May I have the appearances, please?

MR. MAYNARD: Good morning, Your Honor. Timothy Maynard, Summer Murshid and Larry Johnson of Hawks Quindel on behalf of the plaintiffs.

THE COURT: Good morning.

MR. HAASE: Your Honor, John Haase, Annie Eiden, Godfrey & Kahn, along with Graeme Rattray who is in-house counsel at Oshkosh Defense, on behalf of the defendant.

THE COURT: Good morning.

MS. EIDEN: Good morning.

THE COURT: Okay. I think you asked to put this on for argument. I'm not sure if that was because you thought you would get a faster decision or there were unique aspects of the case, but let's go.

MR. MAYNARD: Sure. Thank you, Your Honor.

THE COURT: Mr. Maynard.

MR. MAYNARD: So we are here today to discuss plaintiff's pending motion for conditional certification of an FLSA collective action.

Plaintiff has alleged that the defendant has common policies and practices that potentially violate the FLSA on behalf of, not just herself, but all other hourly production and maintenance employees that have worked for the defendants since October of 2015.

We would submit, Your Honor, that the plaintiffs have met their burden in this case. Their burden is to show that there are common policies and practices that apply to the collective -- putative collective class that could have violated the FLSA. That is what we have here and that is what the evidence supports.

Every single person in the collective class is subject to a practice where they are allowed to come into work up to a half hour before the start of the scheduled shift and to stay at work up to 15 minutes after the end of their scheduled shift.

Despite the defendant's arguments otherwise, if you review the available policies and collective bargaining agreement, there is no prohibition anywhere on work occurring during that time. And if you review the testimony of the defendant 30(b)(6) designees, you'll see that defendant does not actually prohibit any work from occurring from that time. And they also don't track what's occurring during that time by these plaintiffs in the putative class.

The CBA only states that the employees are obligated to work their assigned hours. It doesn't say that they could

only work their assigned hours. It doesn't say that nothing can be done in the 30-minute period or the 15-minute period.

And if you look at the policies and procedures and training modules that have been produced by defendants to date, there is nothing that really discusses the 30- and 15-minute periods in any sort of substantive manner this terms of instructing employees on what to do during that time.

The closest we have is a training module on the Kronos timekeeping procedure that says this is -- you know, you're allowed to punch in up to 30 minutes early and you're allowed to punch out up to 15 minutes late. And also, by the way, you should be punched onto a nonproductive labor code or a work order within three minutes of being punched in.

There is no explicit if you're punched in during a 30-minute period you should not be working, you should not be at your workstation, you should not be getting any workstation prepared so that you're ready to go at the start of your shift.

Similar at the end of the day. There's nothing that explains, you know, once the bell rings at the end of the day you must drop everything and leave your shift.

And that is -- that's the issue here. The defendants have gone through great lengths to try and analogize this case to this Court's decision in *Tom v. Generac*, which was a case also about pre-shift work being performed, and they've essentially tried to retrofit the facts of the case to the

Court's analysis in that case.

Unfortunately the facts don't fit here. And the most important thing -- takeaway from the *Generac* case was that there was an explicit prohibition from the employees that they were not allowed to work outside of their scheduled hours without supervisor approval.

There was then another explicit policy that said if you work during that time you are expected to tell your supervisor about it and make sure you are paid for it and we'll pay you for that time, but we'll also discipline you for working without approval.

None of those things exist here. Essentially what the defendants have is a practice that treats these 30-minute windows at the start of the day and 15-minute windows at the end of the day in a vacuum that's disconnected from the rest of the day. And it's really those particular time periods that are at issue here.

The defendants have tried to say, well, you can look at the plaintiff's payroll records and see that we don't always pay them to their scheduled hours, we'll adjust time. Sure, but if you look at the actual instances where they were adjusting time, they're adjusting when work occurs outside of the 30-minute window. So if someone punches in 35 minutes early they'll get paid, but if they punched in at 30 minutes early they don't get paid. If they punch out 20 minutes late they'll

get paid, if they punch out 14 minutes late they won't get paid.

There is no logical reason to distinguish between those periods of time of what is compensable and what should be adjusted, absent the clear prohibition on work occurring in these periods.

The defendants have tried -- have spilled a lot of ink about whether or not this is a grace period versus a rounding policy. Frankly at this point in time it doesn't matter, Your Honor. Call it a grace period, call it a rounding policy. The reality is this: If the work is being performed in the 30 minutes pre shift and the 15 minutes post shift, then it has to be paid. There is no -- there is no exemption or no qualification under the FLSA that would say calling something a grace period means that you can accept free work during that period.

That is the issue here. If you look -- you know, they've talked about auditing their Kronos records, and they've done so in a way that's sort of misleading because they say, yeah, we do audits. Well, they audit what occurs during the shift, they audit what occurs outside of the 30- and 15-minute period, but they've testified, their 30(b)(6) designee has testified they do not audit what occurs in the 30-minute and 15-minute period despite having instructions that say that you need to be punched onto a nonproductive labor code or work order within three minutes of punching in.

You know, that failure to have any oversight over what's occurring here is a class-wide practice and issue that affects everyone and could lead to a violation of the FLSA.

Absent a prohibition on this work occurring, or a prohibition on this occurring during this time, there is no reason to believe that every single person in that collective class who was allowed to show up to work during these pre-shift and post-shift periods is not performing work.

And there are other, you know, arguments that defendants make, Your Honor, that frankly don't really get to the nuts and bolts of this matter.

You know, they argue that the average punch times between people are too varied. Frankly, the average punch times don't matter. You're looking at overtime accrues under the FLSA on a workweek-by-workweek basis.

If someone for three months punched in every day 15 minutes early and then for the rest of the statutory period never punched in early, they would still have claims in those three months. So the average punch times don't really mean anything.

We've talked about their adjustments to the pay records don't really show -- they don't mean anything unless they're able to show, yes, here's the times when we've made actual adjustments in the periods that are at issue.

THE COURT: Are you saying that everybody who punched

in early was working?

MR. MAYNARD: I'm not saying necessarily that everyone who punched in early was working, but everyone could have been working based on the --

THE COURT: Does the fact that they could have been working entitle them to overtime?

MR. MAYNARD: No. That's not what we're saying, Your Honor.

THE COURT: So you would have to show -- you would have to establish as to each member -- class member that they were working during the grace period or whatever you want to --

MR. MAYNARD: Eventually, Your Honor. Not at conditional certification. We just need to show --

THE COURT: Right.

MR. MAYNARD: -- why it -- why this is potentially an issue for everyone right now.

THE COURT: Yeah.

MR. MAYNARD: And if notice goes out we might be able to figure out more specifically, once everyone is notified that there's a potential issue here, where this is happening, how often it's occurring.

THE COURT: Doesn't that make it an individualized determination as to each employee in the pay period? And you have people with many different supervisors who may or may not have known if some work was being done? Aren't you into that

individualized determination?

MR. MAYNARD: It could be down the road, Your Honor. But at this point at conditional certification, it shouldn't be individualized because we don't even know how often it's working.

We might find out when notice goes out and people have an opportunity to join that, okay, it's happening on this line and this line and this line and there's actually separate subclasses within the broader collective right now.

So while potentially it could be individualized, it's premature at this point in time to say that it's individualized and notice shouldn't go out because the practice is the same for everyone and there is no prohibition on the work occurring during that time.

THE COURT: Okay. Mr. Haase, or your side?

MR. HAASE: Thank you, Your Honor.

The first thing that struck me in hearing opposing counsel's comments were that in the initial complaint filed in this action, plaintiff alleged an illegal rounding practice.

In the amended complaint that was filed on the same day this motion was filed, alleged an illegal rounding practice. Opposing counsel's initial brief alleged an illegal rounding practice. And today we hear opposing counsel say it doesn't matter if we have an illegal rounding practice.

And the reason for the change and the shift in

strategy is that opposing counsel realizes Oshkosh Defense does not have an illegal rounding practice at all. And as you point out, Your Honor, what they're really alleging in this case is that some employees may be violating the prohibition on pre-shift work.

THE COURT: Where does the -- where is the prohibition? That seems to be real distinction that's drawn between this and *Generac*. Where is the prohibition? It's not in writing but it's -- where? Where is it?

MR. HAASE: Your Honor, in this case, unlike *Generac* where there were policies that the employer could unilaterally revoke at any time, the employees that are in the putative class here are all members of a collective bargaining unit. For years they've been represented by the United Autoworkers. So the employees in this class have a designated bargaining representative for purposes of wages, hours and conditions of employment.

Through the collective bargaining process, the parties had come to a written collective bargaining agreement which sets forth several rules in writing which not only the company is obligated to follow, but so are all those employees. And these rules make it abundantly clear that employees can't decide to work when they want to work.

THE COURT: Unions don't like their members working for free, do they?

MR. HAASE: Absolutely not, Your Honor. And one of the declarations we submitted from the -- from one of the leaders who works at the Oakwood facility where they essentially are testing trucks for final delivery, there they start at 4 in the morning. And he said, "My problem is getting people up and started and working when the shift time starts."

I want to talk a little bit about what they're actually proposing in this case in terms of a class, Your Honor. It's a huge class — over 3,000 current and/or former employees of Oshkosh Defense. These individuals work at either one or more of eight different facilities at the company, in either one or more of 70 very different job classifications where employees perform very different duties.

I thought we were going to be talking about a rounding policy today, but apparently not. Clearly Oshkosh doesn't have a rounding policy. What it does, Your Honor, through the collective bargaining agreement, is it schedules employees to work, it tells them to work those hours, and it pays them for those hours.

So now you asked where is the prohibition in working outside of their shift. First, Your Honor, under the collective bargaining agreement employees have a standard eight-hour work day. They have standard shifts established by the collective bargaining agreement. Except for overtime hours, if the shift hours are changed the employees need to agree to it.

The collective bargaining agreement addresses when employees get overtime. As you know, relevant to this case the Fair Labor Standards Act requires employers to do one thing — that's pay time-and-a-half the regular rate for hours worked over a 40 in a workweek.

Oshkosh Corporation has agreed in writing in the collective bargaining agreement that's given to every employee, that you get time-and-a-half your regular rate for any work done over eight hours in a work day and for any work done on a Saturday. If an employee works more than 10 hours in a day, they get double-time. And if they work on Sundays, they get double-time.

In 2018 alone, Oshkosh Defense paid current employees in the putative class $5.6 million in overtime pay. This is not a company that's trying to shirk its obligations to pay employees overtime.

Now, an important thing to keep in mind is employees get a copy of the collective bargaining agreement, unions know what's in the collective bargaining agreement and they take very seriously their overtime -- their right to overtime. If employees -- if employees were working over eight hours a day, which is the allegation in this case, clearly the company would have heard about it at some point. It didn't.

Under the collective bargaining agreement there is a grievance procedure, Your Honor, where an employer or a union

can file a grievance --

THE COURT: But I think the point that plaintiffs are arguing isn't that these employees were ordered to do it, but they did do it. It was just they got there early and they were ambitious employees or they wanted to set up and they found it better to begin work earlier than to try to get everything going when the whistle blows whenever. And that under the Fair Labor Standards Act, the company has an obligation to either prevent them from doing that -- or if it sees them doing that to stop -- you know, pay them. It can't acquiesce, as I understand the Fair Labor Standards Act, even if it's not -- if they're not claiming wages, the company is not allowed to take advantage of overambitious employees which there are -- I'm sure there are some.

MR. HAASE: Your Honor, I don't disagree with that statement. But relevant to that, first, the company does take action to police these pre- and post-shift times. It has its team coordinators on a production floor during these periods of time. We've submitted multiple --

THE COURT: Plaintiffs allege that they're not looking at what people do, though. They're looking at other violations.

MR. HAASE: That's not true, Your Honor. The declarations we've submitted from multiple team coordinators all say they are looking at what employees are doing, and in their observations the employees are not working. They're sitting in

chairs with air-buds in listening to music, they're getting coffee, they're sitting in the break room, they're socializing with coworkers.

So we've provided substantial evidence that team coordinators, supervisors are on the floor. One of their jobs is to monitor what employees are doing, and in their observations employees are not working.

THE COURT: We're at the initial certification stage which doesn't require a determination on the merits. But it's kind of that determination that if there is a case here then it makes sense to allow a collective action.

Why not acquiesce -- why not go along, okay, we'll give notice, we'll clear all this out right away? What are the costs to the company to notice? Why do you fight notice before you get to the merits?

MR. HAASE: Your Honor, as has been articulated in a number of cases dealing with the standard of review, the issuance of the notice in this case is going to go to over 3,000 people. That could potentially result in hundreds or even thousands of employees opting in.

The first thing that will happen if there are any more opt-ins, is opposing counsel is going to ask us to produce all of their payroll and pay records. From there, additional depositions and discovery burdens will fall on the company, in addition to additional analysis.

And the cases that have focused on those factors and the burdens to the defendant have held, as you indicated, Your Honor, if these are individualized evaluations of potential liability, and if it's clear at the conditional certification stage that certification is not appropriate, then you shouldn't issue conditional certification.

THE COURT: Uh-huh.

MR. HAASE: Your Honor, in thinking about that issue, though, I also go back to what Judge Scalia wrote in the *Hoffmann-La Roache* case back in the late 1980s which authorized the conditional certification process, and he can say it better than I can and I'll quote his words in a minute. But what's important about it is it illustrates that conditional security isn't -- conditional certification is not a minor thing and shouldn't be lightly undertaken in any circumstance. This is what Judge Scalia said.

A request by a plaintiff asking the court to conditionally certify a class is "a request to use its compulsory process to assist the plaintiff in locating nonparties who may have similar claims and obtain their consent to the plaintiff's prosecution of those claims."

In other words, what the request is, is to get an assist from the court to notify non-litigants of their right to join a case where they could be litigants.

The Fair Labor Standards Act once had a provision that

allowed for Rule 23 classification. That was removed by the Portal-to-Portal Act and class certification is no longer appropriate.

The structure of the statute is that employees have to affirmatively opt in. Now, I agree that district courts can exercise their discretion where they feel it's appropriate to grant conditional certification. But the point is what the court is doing is really helping one party to this litigation at the expense or potential expense of another party when conditional certification is issued.

Your Honor, I want to get back to this argument that the company doesn't have any policy that prohibits employees from working outside their shift. That is not correct. The collective bargaining agreement that has been negotiated with the employees' authorized bargaining representative at Article 7 says this explicitly:

"It is the obligation of employees to work as scheduled on the work assigned by the company. An employee who decides to work outside their scheduled shift is not working as scheduled and they are violating that provision of the contract."

Your Honor, the plaintiffs are focused on whether or not the company technically used words that are clear enough to them to understand that pre- and post-shift work was not authorized.

But the proof is in the pudding in this case, Your Honor. The employees themselves knowledge that the collective bargaining agreement prohibits pre- and post-shift work. We've submitted seven declarations from putative class members where they all acknowledge the rule and understand the rule and know the purpose of the rule.

Not only that, we've had the opportunity to depose just three of the current plaintiffs. Each and every one of them, including the lead plaintiff, admitted that the collective bargaining agreement prohibits them from working outside of their shifts.

Now, Ms. Marquette has filed a declaration in this action where she says, "I didn't know I was prohibited from working outside of my shift during the 30- and 15-minute windows." But, Your Honor, that testimony is directly contradicted from what's in her deposition on multiple pages of the deposition transcript.

With respect to the issue of grievances, Your Honor, as I said, what these plaintiffs are -- what the plaintiff is alleging here is that she's working outside her shift more than eight hours a day and not getting overtime for it. The collective bargaining agreement prohibits her from working outside of her shift. And it also says if she works more than eight hours in a day she needs to get paid time and a half. If there was some significant issue of the type alleged by

Ms. Marquette in this case, the company would have gotten a grievance that it wasn't paying employees overtime.

Since 2009, the union here has filed 6,000 grievances. 40 percent of them relate to employees' pay. Were not getting overtime when they felt they should get overtime. Not a single one of those grievances has ever alleged that employees are being asked -- that employees are working outside their regularly scheduled shifts and not getting paid for it. That issue has never come up.

In fact, the plaintiffs who are in this case now have filed 38 grievances against the company. None of them has ever alleged that they're working outside their shifts and not getting compensated.

Your Honor, another important fact which opposing counsel ignores, is Oshkosh Defense has no policy or practice that requires the employees to even arrive to work or punch in before the start of their shift.

In the collective bargaining agreement there's an attendance policy. Under the attendance policy it's a violation if employees are late. The definition of being late or tardy, however, Your Honor, is an employee punching in after the start of their shift. Marquette admitted she understands that rule, and that she can punch in right when she enters the facility even if she's not at her workstation working. And so long as it's not after the start of her shift, she's on time and getting

paid for her shift hours. All of the other opt-ins who we deposed also understand that rule.

With respect to the 30- and 15-minute windows, Your Honor, those are grace periods for the benefit of the employees and their convenience.

Think about some of the facilities at issue in this case. One is South Plant. This is an assembly facility for Oshkosh Defense. Just on the second shift alone there's 750 employees and the facility is 350,000 square feet. Without some window at the front end of the shift for people to arrive, it would be chaotic. People all can't arrive and punch in at the same time. This flexibility benefits the employees.

One of the opt-in employees who we deposed, Mr. Vue, talked about that he understood these grace periods to allow people commuting flexibility. He lives a long way from the plant. So to deal with potential traffic jams or weather issues, he leaves a little bit earlier than his normal traffic time would allow. The grace period allows him to come into the facility before his shift starts and sit down, have a cup of coffee, shoot the breeze with his coworkers. He even testified that the reason he gets there early is to get a good parking space.

Other declarations we submitted from potential class members also acknowledge that the grace periods are there for their benefit and convenience.

Your Honor, another important fact that was also present in the *Generac* case is that not only does the company prohibit work outside the shifts, but when employees arrive Oshkosh Defense signals the start of the workday by either a buzzer or a bell. So employees are put on notice when it's time to start working. The declarations we've submitted from potential class members all acknowledge their understanding that the start-of-shift bell means you start working. Even Ms. Marquette admitted that during her deposition.

Your Honor, at the end of the shift it's the same thing. Oshkosh Defense sounds a bell, employees know it's time to stop working.

The testimony that we've submitted in this regard is compelling. Marquette said that everyone in the plant knows that when the end-of-shift bell sounds it's time to stop working. That's the lead plaintiff's testimony, yet she's alleging there's a class practice where employees are working after their shift based on some common policy.

She also described the end of shift as a mass exodus. Other employees described it as a stampede, a mad dash. 95 percent of the employees are lined up at the Kronos clocks at the end of the shift to punch out.

The time records of the plaintiffs, Your Honor, support that there is nothing -- no work being done at the end of the shift. 27 of the 30 plaintiffs in this case on average

punch out less than one minute after the end of their shift. The other three average just over a minute, just over a minute and a half in three minutes.

Your Honor, these facts make it clear that Oshkosh Corporation tells employees and agrees with employees when their shift hours are, it pays them to those shifts, it prohibits work outside of the shift, and it polices whether employees are doing work outside of their shift.

Another important factor on this policing issue. As opposing counsel points out, the company doesn't do specific Kronos auditing of an employee's punches during the 30- or 15-minute windows, but it does all sorts of audits on employees' Kronos punching into the time clock.

And what this means is that employees and their supervisors are constantly interacting about their pay records and their time records. In fact, we have submitted evidence that all of the plaintiffs in this case on multiple occasions have asked -- have had their schedules adjusted, including within the grace periods, to account for work that was performed.

This happens when a team coordinator asks someone to stay late or come in early. It could happen where an employee got started early and was seen doing it. But the company polices this issue. And we've even submitted evidence from the HR employees at the company that when it becomes aware of

employees working outside of their shift, it deals with it first with a verbal warning and then more formal discipline thereafter. So the company does police this issue, Your Honor.

The bottom line here, Your Honor, is that the claims in this case do not allege that there's a common policy -- or the facts in this case do not prove that there's a common policy applicable to the class which deprives them of any rights under the FLSA. There's no evidence of that.

What is really going on is you have a series of individualized claims that some employees have taken upon themselves to violate the rules, work before their shifts, and now they're seeking compensation.

But to get to the bottom of each plaintiff's claims is an individual test. We would need to find out: What work is this employee claiming that they perform? What is their job? How does that alleged work relate to their job, if at all? How long are they doing it? Is it de minimis? Are they claiming that they weren't aware of the rule prohibiting work outside their shift? Is that a credible claim?

It would involve questions about our other defenses as well, Your Honor. All of these issues require individualized determinations which are not susceptible to class litigation, Your Honor.

Consider just the nature of the work involved in the 70 different classifications. These include janitors, welders,

final truck testers, truck drivers. None of these employees do work that's even remotely similar. They work in eight different manufacturing facilities that have different purposes. One manufacturing facility is for assembly, another is for paint. One is for welding and fabrication. There is one where trucks are tested. There is one where they're stored for delivery. These are vastly different operations that they're trying to include in the proposed class.

If you looked just at the three plaintiffs that we've been able to depose, the fact that these are individualized claims is really clear. Ms. Marquette is a fabricator. She works on a machine that bends parts.

She's also -- works on a shift that has three eight-hour shifts scheduled each day. So just consider that for a minute, Your Honor. Someone is working on the machine she works at for the eight hours before she starts and someone starts after her eight-hour shift is done. Just given that, her claim that she's doing pre-shift work is illogical. But she claims that her pre-shift work is organizing parts, turning on her press brake.

Scott Vue, on the other hand, claims that he's gathered parts and sets up his workstation.

Marquette on average punches into the facility only two minutes before the start of her shift and punches out 45 seconds after the end.

Mr. Vue punches in, on average, four minutes before the start of his shift and only 20 seconds after it ends.

Marquette claims that she was working the entire time after she punched into the facility, which again is not a credible allegation, Your Honor. She admitted that it takes her a couple of minutes from when she punches in when she enters the facility to get to a workstation. On average she only punches in two minutes before the start of her shift. How can she be performing work during that whole two-minute time?

Mr. Vue claims that he starts working before he even punches in during the grace periods. So his claim isn't even consistent with the allegation that somehow these punching windows are resulting in employees working before the start of their shifts.

Each and every plaintiff who decides to enter this case, their claim will be determined based on individual determination of a myriad of factors which are not common in any way to the class. And that they won't vary just from employee to employee, but they'll also vary based on a single employee depending on his or her position on a particular time, what they were doing on a particular day, what shift they worked, who was their team coordinator, and what were their personal motivations for coming in early and allegedly starting work early.

Your Honor, given these facts, it's clear that these claims are not susceptible to class litigation and the class

should not be certified. We'd ask you to deny the request.

MR. MAYNARD: Thank you, Your Honor. I'll try and address everything that defense counsel's argued here.

First, he stated that he came here to argue about an alleged rounding practice. Again, whether you want to call it a grace period or a rounding practice at this point in time is a difference without distinction. The reality is this: If employees were punching in 10 minutes before their shift and starting to work and they were not getting paid until the start of their shift, that's effectively a rounding practice.

The same thing at the end of the day. If they're punching out 10 minutes after the end of their shift because they continued working and they only get paid until the end of the shift, that's a rounding practice. They're rounding the start and end of their times only in the employer's favor. So to say that we've changed our theory at this point in time is simply misstating what the reality of this case is and how it works.

They -- defense counsel's argued that there's no policy that requires employees to come into work early. But the FLSA does not only require employers to pay for time that is worked that is required, they have to pay for all work that is suffered or permitted to be done.

And that's what we have here failing a clear prohibition. That is a class-wide question for everyone in the

collective action. You are all allowed to come in early, you're all allowed to punch in, and they do not -- the evidence shows they do not monitor what's occurring during this time.

They have one -- they have brought a group of team coordinators who say, yeah, people aren't working during this time. All of the plaintiffs, 14 plaintiffs who have testified and provided declarations in support of the motion, have said no, I am working and my team coordinators do see me working and they're not insuring that we're being paid for it.

So there is a factual dispute there. But even worse is, in undercutting their argument that there's a clear prohibition, team coordinator Steven Peronto has submitted a declaration in support of defendant's opposition, acknowledged that he supervised one of the opt-in plaintiffs, David Sunquist. And he acknowledges, he says David Sunquist doesn't work before his shift, but on occasion I've seen him looking at the trucks that he's about to work on before the start of the shift.

And the next statement he makes is the most telling statement here. He doesn't say and I go up to him and I tell him, hey, you can't work and I make sure he gets paid if he's doing that or I make sure he's not working. He says my assumption is that he was just using his own time to see where the last shift left off.

That does not support their argument that there's a clear prohibition here. If their team coordinators are actively

policing this issue, then Mr. Peronto who saw that issue would have been trained to say that's an issue I need to go make sure that's not happening.

That did not happen here. And that declaration for Mr. Peronto supports that there just is not a prohibition and that's not a clear prohibition. And the failure to have that prohibition is why a notice should go out. They want to talk about whether it's too individualized. But they don't get the benefit of the doubt here where they don't have the clear prohibition. Because while they're saying that the notice process is the court lending an assist to the plaintiffs, that's not the case. The FLSA is a remedial statute. The purpose of the conditional certification process is to notify people who potentially had their rights under that policy violated so that they can assert a claim before their statutory periods evaporate. And that's what's happening here.

So this is a way that the courts have allowed a more reasonable approach rather than filing a collective action and saying, okay, launch into Rule 23 discovery from the outset before we even figure out if this initial burden is met.

That is -- and that goes to the Court's question about the costs, the costs of sending out notice. You know, there's a cost to the employer clearly when they have to send out a notice. And people assert legal claims against them, there's always going to be a cost of defense.

There's also a cost to plaintiffs who don't get notice and are never notified that their rights may have been violated. So I don't understand why is it that the cost to the defense is important here, but the cost to the potential plaintiffs and the potential putative collective action members, who have never been informed clearly when the compensable workday starts, when they should be getting paid, why isn't it -- why isn't it that the cost to them, the potential lost wages that they're not going to receive, why is that not a factor?

They've talked about the -- they've talked about the fact that there's a CBA and this is a unionized workforce, that's fine, and that potentially these claims could be grieved. The problem is this. What constitutes work under the Fair Labor Standards Act is a legal term of art.

You can't expect every -- every layperson to understand, well, I guess my work started at this point. I guess it started at this point.

Of course, now when they're deposed the plaintiffs are going to say, yeah, I think it is a violation of the CBA and that I was working more than eight hours. Because now they've had the chance, they're in federal litigation against the defendant and they have attorneys who are saying, hey, you know, here's what potentially starts the workday under the law.

That's not explained in the CBA. The CBA never says, hey, you can only work your eight-hour shift. Again, it says

you're obligated to work your assigned, your scheduled hours, it doesn't say you can't work before or after them. It doesn't say, you know what, if you're coming in early and you're starting to set up or you're doing pre-assembly on parts that you're going to be assembling into a truck once the shift starts, you need to be paid for that time. There's nothing that explains that to these employees. So to say that they could have grieved it, fine, but that assumes a base level of knowledge on how the law works, that simply that -- it's not there.

You know, the Court has -- they've discussed that this is a large class of 3,000 employees over multiple locations. You know, the Court addressed that and the fact that it may be individualized. The Court addressed that in the *DeKeyser v. Thyssenkrupp* decision where it was similar, a class of 4,000 employees, over five or six different locations, and the Court said, well, it could end up being individualized, but it's not appropriate right now because the plaintiffs have met their burden. They've showed that there is a common policy or practice that could violate the law.

And that is still what we have in this case. And a practice that allows them to come in, a failure to explicitly prohibit work, that affects everyone and notice should go out to everyone so we can find out who was working. They should have the right to assert their claims and find out about their

claims.

The defendant has argued that this is -- that these pre- and post-shift periods are essentially there to provide flexibility to the employees. You know, I fail to see what flexibility is allowed to the employees in allowing them to stay 15 minutes after the end of their shift without paying them. To the extent that they're allowed to arrive early to get to their shift, fine, even if you're providing it for flexibility for the employees, you still have to make sure that they're not working during that time if you're not going to pay them for it.

And that's what they failed to do here. So you can't just say, oh, we're doing this to be good guys. Great. You needed to go a step further here. It's your obligation to make sure that work that you don't want performed is not performed. And that's the failure here.

They talk about having a CBA that provides, you know, more robust overtime pay when people work over eight hours in a day as opposed to what the FLSA requires for over 40 hours in a week. That really doesn't matter to this case. The reality is this. If employees are scheduled to work 40 hours a week and in a workweek they come in and work 15 minutes early three days and work an additional 45 minutes, in that workweek, under the FLSA, that employee is entitled to 45 minutes of overtime pay regardless of what the CBA says.

This is not a claim that they violated the CBA. This

is a claim that they violated our -- our plaintiffs and the putative class's statutory rights under the Fair Labor Standards Act. There is no administrative exhaustion requirement, there is no requirement that a plaintiff has to grieve a statutory right.

THE COURT: All right. Anything else?

MR. MAYNARD: One minute, Your Honor.

They've also talked about the buzzer, that there's a buzzer at the start and end of the shift. There is a buzzer at the start and end of the shift. There was also in the *Generac* decision. But what was important in the *Generac* decision was how robust the policies were and how they all worked together to inform employees that you're not allowed to work. A buzzer without a clear prohibition saying, hey, you're not allowed to work before the buzzer is meaningless. It just means, okay, now you've gotta be working, the buzzer is on. It doesn't mean you can't be working beforehand. It doesn't mean you can't be working afterwards.

The -- you know, they talk about the CBA sets an eight-hour day -- eight-hour workday as the standard workday. Fine. The CBA also explicitly says that it -- nothing in the CBA should be interpreted as a guaranty or a limit on the hours to be worked.

Again, they've talked about average punches. Average punches don't matter. What matters is, you know, in a

particular workweek when is someone punching in and when they're working. Again, someone who worked -- came in 15 minutes early and worked for 15 minutes a day over a three-month period over a statutory period and then came in at the start of their shift, might have an average punch of two minutes before the start of their shift. That ignores the fact that for a three-month period they were coming in 15 minutes early every day.

Defendant's also trying to shift their obligation and their burden onto the union here. Great. This is a unionized workforce. The employer doesn't get to say we don't have to follow our obligations under the FLSA because there there's a union here. I have a hard time imagining the union would have a big problem if they went to them at the bargaining table and said, hey, you know what, we need to have -- we are allowing this 30- and 15-minute period for them to come in there, we need to explicitly state in the CBA they are not allowed to work during that time.

Similarly they say that there's never -- they talk about the grievances that have been filed and that there's never been any sort of -- any sort of complaint about work occurring in these pre-shift and post-shift periods. That's frankly not true.

30(b)(6) designee Kristin Pick testified that in late 2018 or early 2019, at a bargaining meeting between the union and the company, that the union brought up that there were a

group of employees that were coming in and working during this time period. They asked the union to tell them who it was and the union declined to do so at that time. And the company essentially said, you know what, we're going to leave it at that. We're not going to look into it any further.

That is not complying with their obligations under the FLSA to make sure if that work's occurring, it needs to be paid or it needs to be stopped.

THE COURT: Anything else?

MR. HAASE: Just a couple of points, Your Honor.

It seems to me opposing counsel's main argument today is that the company is not sufficiently monitoring what employees are doing in the --

THE COURT: Could you pull the microphone more to you? The clerk tells me they're not picking you up as well.

MR. HAASE: It seems to me their argument today is, is there's not a clear prohibition on pre- or post-shift work and that the defendant is not doing enough to monitor what employees are doing during those pre- and post-shift periods. There are undisputed facts that contradict those contentions. I already talked about the collective bargaining agreement. It does prohibit employees from working outside their scheduled hours.

The company during orientation tells employees that when you punch in, that's for attendance. And the instructor tells them that you shouldn't be working during those periods.

Team coordinators, as established by declarations and admissions from the plaintiffs we were -- excuse me, as established by declarations from team coordinators and supervisors, those individuals are on the floor, they're monitoring the employees' activities during the pre- and post-shift windows, and they describe that they're not seeing anyone working.

The fact that Mr. Peronto saw one plaintiff looking at a truck is not evidence that we're not properly monitoring it. The facilities are filled with trucks. A person can't walk into the facility and not look at a truck. If you're waiting for your shift to start, you're going to be looking at trucks. There's no reason why Mr. Peronto should have done more investigation there.

One thing I failed to mention earlier. The company routinely conducts floor checks where, as part of their compliance program, they go and ask a random group of employees a series of questions related to whether they're properly recording their time.

One of the questions, Your Honor, is: Have you reported all of your work hours? And another one of the questions is: Have you gotten paid for all your overtime?

No employee has ever answered negative to either of those questions. The company disciplines employees for working outside of their shifts. And it indicates when shifts start and

stop by a buzzer, which is obvious what the purpose of that is.

Again, these are individualized claims. What were individual plaintiffs doing and why? Are the tasks compensable work? Was it a de minimis amount of time? Why were they engaging in the work, if at all? Are all individualized inquiries and -- both class certification -- even though we're not there, but clearly conditional certification is not appropriate.

THE COURT: All right. I'm not going to take it under advisement. I'm going to deny the motion for conditional certification.

I'm satisfied that this is too close to *Generac*. This is a grace policy, it's not a rounding policy. It does make a difference. It's clear the company has operated this as a grace policy.

At most the evidence shows that there might be some employees who have ignored their instructions from the HR and others and the clear import of the union agreement and may have started doing things -- although I agree, looking at a truck hardly seems -- I guess you'd have to go into someone's mind to know if that's some sort of pre-work intent or not.

But that shows the difficulty and the individualized nature of each of these claims. It depends on the individual, it depends on the day, when they arrived, what they did. Who their supervisor was. Was the supervisor -- because it's not

enough simply to show that somebody did something; you have to show that the company acquiesced in it and allowed it to occur, which implies that somebody knew about it or realized it.

And it seems to me the company has pretty good evidence here that they tried to prevent this. And that the way it's set up, the way the time is kept, the way the whistle blows or the work -- beginning work and the ending work is sound with three shifts, these are the types of things that would, for the most part, confine individual employees to working during their shift and not after and not before.

That's not to say there may be some employees who have avoided that somehow. But I'm satisfied that there is not a showing, the kind of showing one would expect that there's a reasonable basis for believing that the -- they're similarly situated to the potential class members.

It seems each -- any violation here would have been very individualized. It's individualized to the employee, to the day, to the supervisor, to the job.

All of those things convince me that this case fits under the *Generac* type of case where it's so specialized, it's so unique that a collective action would not be a reasonable way of proceeding. So the motion for conditional certification then is denied.

Anything else today?

MR. MAYNARD: Nothing further. Thank you, Your Honor.

MR. HAASE: Thank you.

THE COURT: All right. Thank you, all.

(Hearing concluded at 10:51 a.m.)

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C E R T I F I C A T E

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified September 11, 2019.

/s/John T. Schindhelm

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